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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 794

COMMONWEALTH OF PENNSYLVANIA,

vs.

FRED C. PERKINS, INDIVIDUALLY AND TRADING AS PERKINS BATTERY COMPANY,

Appellant.

STATEMENT AS TO JURISDICTION.

Fred C. Perkins, individually and trading as Perkins Battery Company, by his Attorneys, Samuel Kagle, Esquire and J. Edgar Small, Esquire, respectfully submits the following statement in support of the jurisdiction of the United States Supreme Court to review the judgment of the Supreme Court of Pennsylvania, on appeal:

A. The statutory provision sustaining the jurisdiction of the United States Supreme Court is under Section 237(a) of the Judicial Code, Act of February 13, 1925, Chapter 229, 43 Stat. 936, which reads as follows:

> "Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The Writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution, or remand the cause to the court from which it was removed by the writ."

The Statute of Pennsylvania involved in this cause is the Act of 1936, P. L. 1937, 2897, 43 P. S. (Pocket Supp.) Section 751, known as the "Unemployment Compensation Law", which statute appellant contended was repugnant to the Constitution of the United States, and the final judgment of the Supreme Court of Pennsylvania was to sustain the validity of said statute.

The pertinent section of the "Unemployment Compensation Law" which is here involved is as follows:

> "Sec. 307. No employer required by this Act to pay contributions, shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that this Act does not distinguish between employees engaged in interstate commerce and those engaged in intra-state commerce."

The date of judgment of the Supreme Court of Pennsylvania was June 30, 1941 and the date when application for allowance of appeal and for a review of the proceedings was made to the Chief Justice of the Supreme Court of Pennsylvania—as required by the Rules of the Supreme Court of Pennsylvania—was July 26th, 1941; the Supreme Court of Pennsylvania, in a *per curiam* Order, dated Sep-

tember 23, 1941, dismissed said Petition for Allowance of Appeal and a Review of the Proceedings.

Nature of Case.

This action in assumpsit was brought by the Commonwealth of Pennsylvania to recover contributions due under the "Unemployment Compensation Law" of Pennsylvania. Appellant is engaged in the business of manufacturing and selling storage batteries at York, Pennsylvania. He is engaged in interstate commerce and employs less than eight persons. The Statute in question requires employers of one or more persons to pay a tax of 2.7% on the earnings of said employee or employees, and Section 307 of said Statute specifically provides that no employer shall be exempt on the ground that he is engaged in interstate commerce or that the Act does not distinguish between employees engaged in interstate commerce and those engaged in intra-state commerce.

This Statute is patterned after the Federal Unemployment Contribution Law, Title IX of the National Security Act enacted August 14, 1935, Chapter 531, Section 901, 49 Stat. 639, U. S. C. A. Title 42, Section 1101. The Pennsylvania Statute differs from the Federal Employers' Contribution Statute in that the Federal Employers' Contribution Statute exempts employers of less than eight persons.

The employer, contending that the Statute was unconstitutional, filed an Affidavit of Defense Raising Questions of Law, wherein it was specifically averred that the Statute violated Section 8 of Article I of the Tenth Amendment of the Constitution of the United States.

On November 4, 1940, after argument, the Court of Common Pleas of Dauphin County overruled the Affidavit of Defense Raising Questions of Law and directed that an Affidavit of Defense be filed as to the merits.

In overruling the questions raised under the Federal Constitution, the Court in an Opinion by President Judge Hargest said (R. 29 to 34, inc.):

"3. It is contended that Section 307 of the Act violates the commerce clause of the Federal Constitution. Section 8 of Article I of the Constitution of the United States provides, inter alia: 'That Congress shall have power * * * to regulate commerce with foreign nations and among the several states * * *.' The Tenth Amendment provides: 'The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively and to the people.'

It is settled that the state cannot levy a direct tax on gross receipts derived from interstate commerce. Meyer *v.* Wells, Fargo & Co., 223 U. S. 298; Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 295, 297; Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450. Neither can the State tax the privilege of engaging in interstate commerce although it may tax the property within a State so employed. Wells, Fargo & Co. *v.* Nevada, 248 U. S. 165, 167; East Ohio Gas Co. *v.* Tax Commission, 283 U. S. 465, 469; Adams Mfg. Co. *v.* Storen, 304 U. S. 307, 311.

The contention of the defendant is that this tax is invalid because the employer is engaged in interstate commerce and it amounts to a tax on the privilege to so engage within the State. There is no factual situation to show that the defendant is within that class, but we prefer to put our decision on the broader ground assuming that he is.

The defendant largely relies on Southern Pacific Co. *v.* Gallagher, 306 U. S. 167, 180. In that case the Court, referring to the case of Ozark Pipe Line Corp. *v.* Monier, 266 U. S. 555, said: 'This Court pointed out that the corporation had a license to engage exclusively in interstate business. The language just quoted shows that this Court interpreted the transactions in Missouri as merely a part of the interstate commerce and the tax on the franchise an interference

therewith because a tax directly upon it. "Nothing was done in Missouri except in furtherance of transportation." It was this conclusion of the Court on the factual situation which brought about the Ozark decision. Where there is also intrastate activity, an apportioned state franchise tax on foreign corporations doing an interstate business is upheld. A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid. Since the incidence of the California tax as here interpreted is upon events outside of interstate commerce, the Ozark opinion is not applicable. There the Missouri tax was upon activities found wholly interstate.'

There is no factual situation in the instant case which justifies the application of any of the principles above referred to.

There is, however, another situation which requires serious consideration. Section 307 of the statute provides: 'No employer required by this act to pay contributions shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that this Act does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.'

In Section 906 of the Social Security Act, Congress seems to have made plain that it did not intend to cover the field of interstate commerce which the State statute attempts to do. That section provides: 'No person required under a state law to make payments to an Unemployment Fund, shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce or that the state law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.'

The plain purport of that Section seems to be that Congress has intended to meet the specific language quoted from Southern Pacific Co. *v.* Gallagher, supra, and has indicated that it has not intended to cover the field of Unemployment Compensation as related to interstate commerce, even though there is no appor-

tionment of the tax as to interstate and intrastate business.

It may be argued that Congress cannot, by the ipse dixit contained in Section 906, as above quoted, determine that the law, as declared in the case of Sligh *v.* Kirkwood, 237 U. S. 52, shall not apply. However, that may be, it is well settled that even in commerce among the states the police power of the State to prescribe regulations within its borders is not taken away until Congress enters and covers the field.

In Sligh *v.* Kirkwood, 237 U. S. 52, 58, it is said:

'That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the State, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the Minnesota Rate Cases, 230 U. S. 252.'

By the enactment of the Social Security Act, Congress has not been silent but has affirmatively declared that it does not intend to cover this field, and by the enactment of the Pennsylvania statute the Legislature of Pennsylvania has asserted that it intends to exercise its power until Congress does cover the field. In the case of Carmichael *v.* Southern Coal & Coke Co., 301 U. S. 495, the power of the State of Alabama to enact an unemployment compensation act, almost identical with the statute of Pennsylvania, has been sustained. The question of the illegality of the Alabama statute under the commerce clause of the Federal Constitution does not seem to be directly passed upon either in the Supreme Court of the United States or in the Alabama Court. Beeland Wholesale Company *v.* Kaufman, (Ala.), 174 So. 516.

In the case of the Steward Machine Co. *v.* Davis, 301 U. S. 548, the Supreme Court of the United States distinctly sustained the power of Congress to enact Titles 3 and 9 of the Social Security Act. It is there held, with reference to the Alabama Statute, page 597:

'Even sovereigns may contract without derogating from their sovereignty. * * * The states are at liberty upon obtaining the consent of Congress, to make agreements with one another. * * * We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin.'

It is true also that the commerce clause of the Constitution is not directly involved in this decision, but in the case of Wisconsin *v.* Cary Mfg. Co., decided in the Circuit Court of Wayne County, October 9, 1937, C. C. H. Wisc., Par. 8088, the Court had before it the Unemployment Compensation Act of Wisconsin in which the question was directly raised, and there the Court said:

'The defense particularly put forth in the present case as a justification for not making the compensation payments is that the defendant corporation is engaged in interstate commerce, and the state of Wisconsin is seeking unconstitutionally to interfere with that commerce. Reliance is had upon the recent decisions of the United States Supreme Court sustaining the National Labor Relations Act as an appropriate exercise of the power by Congress to regulate commerce between the states * * *

'Congress has not entered upon the field of unemployment compensation, as it has in labor relations, and the question accordingly of conflict with Federal jurisdiction and clash with the commerce clause of the United States Constitution, is purely academic.

'The only ground upon which the defendant might predicate his position is that which may be contended to flow from the labor relations cases; namely, that Congress has pre-empted the field; hence the State must keep out. But the simple truth is that Congress has not. The Federal Social Security Act * * * is not an unemployment compensation law.'

We are therefore of opinion that the Pennsylvania statute does not violate the commerce clause of the Federal Constitution."

Appellant thereupon filed an Affidavit of Defense as to the merits, wherein he averred that he was engaged in the business of manufacturing and selling farm lighting batteries and rebuilding machines and that in the conduct of said business he was extensively engaged in interstate commerce (R. 21 a). In addition thereto appellant averred that said statute was invalid under the provisions of Section 8 of Article I and the Tenth Amendment of the Constitution of the United States. The Commonwealth of Pennsylvania filed a Rule for Judgment for want of a sufficient affidavit of defense, which Rule was made absolute by the Court and Judgment was entered against the defendant for $221.61.

Appellant appealed from the entry of said judgment to the Supreme Court of Pennsylvania and on said Appeal he again raised the constitutional objections that the Statute violated Section 8 of Article I and the Tenth Amendment of the Federal Constitution. These questions were raised in the third and fourth Statement of Questions Involved (Appellant's Brief, page 1) and the fourth and fifth Substituted Assignments of Error (Appellant's Brief, pages

9 to 12, inc.) and they were argued on appeal. On June 30, 1941 the Supreme Court of Pennsylvania, in affirming said judgment, in a *per curiam* Opinion, said:

> "The judgment is affirmed on the foregoing portions of the Opinion of President Judge Hargest."

The Opinion of Judge Hargest on these questions which the Supreme Court of Pennsylvania adopted is identical with the excerpt above set forth and in the interest of brevity will not be repeated here. The Opinion of the Supreme Court is officially reported in 342 Pa. 544 (Advance Reports—October 31, 1941) and in 21 Atlantic Reporter 2d, 45, and is appended hereto.

The question raised in this appeal is of a substantial nature and if the contentions of appellant are upheld, he will be relieved of liability for contributions due under said statute.

The question involved is whether a State may levy an excise tax based on the employment of labor of a business engaged in interstate commerce. The question which Appellant raises in this appeal has not been foreclosed by prior decisions of this Court.

The Supreme Court of the United States sustained the validity of the "Unemployment Compensation Law" of Alabama in *Carmichael* v. *Southern Coal Company,* 301 U. S. 495 and this Court upheld the validity of the Employers' Contribution Tax, Title IX of the National Social Security Act in *Davis* v. *Steward Machine Co.,* 301 U. S. 548, but in neither of these cases was the right of a State to impose an unemployment compensation tax on an employer engaged in interstate commerce, raised, considered or decided. Although Unemployment Compensation Statutes of many of the States have been upheld in the several States, the question here presented has not been raised

or decided in any Appellate Court of last resort other than in the instant case.

Section 307 of the "Unemployment Compensation Law" of Pennsylvania, *supra*, specifically provides that no employer "shall be relieved from compliance * * * on the ground that he is engaged in interstate commerce, or that this Act does not distinguish between employees engaged in interstate commerce and those in intra-state commerce."

Section 8 of Article I of the Constitution of the United States provides, *inter alia:*

> "The Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

The Tenth Amendment to the Federal Constitution provides:

> "The powers not delegated to the United States nor prohibited by it to the states are reserved to the states respectively or to the people."

The right to regulate or supervise persons engaged in interstate commerce is exclusively vested in the United States by the Federal Constitution.

In *Carmichael* v. *Southern Coal Company*, 301 U. S. 495, 508 and *Steward Machine Company* v. *Davis*, 301 U. S. 548, 580-582, inc., this Court declared that an Unemployment Tax is an excise tax based on the right to employ persons. The Legislature of the State of Pennsylvania, by enacting Section 307 of the "Unemployment Compensation Law" is seeking to impose an unemployment compensation tax which is based upon the employment of labor of a business engaged in interstate commerce. If a Pennsylvania employer exclusively engaged in the furtherance of a business of an interstate character employed one or

more persons in the conduct of said business, he would be liable to pay the required tax on the earnings of such employees. We contend that the Federal Government alone possesses the right or power to directly tax an employer for the privilege of employing labor of a business engaged in interstate commerce.

We recognize and concede that a State may impose a tax upon property of an employer engaged in interstate commerce which has its situs within the State, and we also recognize and concede that a proportionate tax which is based upon the employment of labor which is intra-state is valid. In the instant case there is no pretense of levying a proportionate tax, but on the contrary there is a clear attempt to bring within the purview of the Act, the employees who are engaged in interstate commerce.

In *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555, this Court decided that a State can not levy a tax on interstate commerce whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. The Court said (page 562):

> "The tax is one upon the privilege or right to do business (State ex rel. *v.* State Tax Commission, 282 Mo. 213, 234, 221 S. W. 721), and if appellant is engaged only in interstate commerce it is conceded, as it must be, that the tax, so far as appellant is concerned, constitutionally cannot be imposed. It long has been settled that a state cannot lay a tax on interstate commerce in any form, whether on the transportation of subjects of commerce, the receipts derived therefrom, or the occupation or business of carrying it on. Leloup *v.* Port of Mobile, 127 U. S. 640, 648, 8 S. Ct. 1380, 32 L. Ed. 311; Kansas City Ry. v. Kansas, 240 U. S. 227, 231, 36 S. Ct. 261, 60 L. Ed. 617, and cases cited. Plainly, the operation of appellant's pipe line is interstate commerce and beyond the power of state taxation."

At Page 565, the Court said:

> "The business actually carried on by appellant was exclusively in interstate commerce. The maintenance of an office, the purchase of supplies, employment of labor, maintenance and operation of telephone and telegraph lines and automobiles, and appellant's other acts within the state, were all exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, was likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business. The protection against imposition of burdens upon interstate commerce is practical and substantial and extends to whatever is necessary to the complete enjoyment of the right protected. Heyman *v.* Hays, supra, page 186 (35 S. Ct. 403)."

In *Southern Pacific Company* v. *Gallagher*, 306 U. S. 167, this Court discussed, considered and approved the principles enunciated in the Ozark case and in discussing the right of a State to tax interstate commerce, the Court said:

> "Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid. States cannot tax interstate telegraph messages, or freight shipments. A license tax on sales by samples burdens one selling only goods from other states. A tax act as applied to the business of interstate communications is unconstitutional. Where a similar levy by other states may be imposed, with consequent multiplicity of exaction on commerce for the same taxable event, local tax of a privilege, measured by total gross receipts from interstate transactions, is considered identical with an exaction on the commerce itself. This rule is applicable to a tax on gross receipts from interstate transportation, an occupation tax measured by gross receipts from radio broadcasting, and a gen-

eral tax at specified rates upon the gross income of every resident, construed as, 'a tax upon gross receipts from commerce', 'without apportionment.' The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies is upheld." * * *

At pages 177 and 178, the Court said:

"* * * The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property or upon a taxable event in the state apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress." * * *

"This Court pointed out that the corporation had a license to engage exclusively in interstate business. The language just quoted shows that this Court interpreted the transactions in Missouri as merely a part of the interstate commerce and the tax *and the tax* on the franchise an interference therewith because a tax directly upon it. '* * * nothing was done in Missouri except in furtherance of transportation.' It was this conclusion of the Court on the factual situation which brought about the Ozark decision. Where there is also intrastate activity, an apportioned state, franchise tax on foreign corporations doing an interstate business is upheld. A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid. Since the incidence of the California tax as here interpreted is upon events outside of interstate commerce, the Ozark opinion is not applicable. There the Missouri tax was upon activities found wholly interstate."

In *Helson & Randolph* v. *Kentucky,* 277 U. S. 345, a tax of three cents (3¢) per gallon on all gasoline sold at whole-

sale was invalidated because the Statute included gasoline purchased outside of the State of Kentucky and was used in propelling the craft in interstate commerce. The Court there considered the tax on the consumption of gasoline the same as the tax on the operation of a boat. In the same sense and to the same extent, the Legislature of Pennsylvania has attempted to levy a tax which is based upon the employment of persons engaged in interstate commerce.

We contend that it is just as necessary and essential to have employees assist in the conduct of a business as it is for the ferryboat company to have gasoline to propel its boats. If a State can not impose a tax on gasoline necessary to propel a boat, it should not be permitted to tax the employment of persons who are equally as necessary to operate a business engaged in interstate commerce.

Under the "Unemployment Compensation Law" of Pennsylvania, an employer of less than eight persons engaged in the business of radio broadcasting is liable for contributions, but this Court in *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650, declared that a State may not impose an occupation tax measured by gross receipts.

In *Adams Manufacturing Company* v. *Storen*, 304 U. S. 307, 311, this Court invalidated a general tax based on the income of residents because it was construed as a "tax upon gross receipts from commerce without apportionment."

In *East Ohio Gas Co.* v. *Tax Commission*, 283 U. S. 465, 75 L. Ed. 1171, in discussing the power of a State to impose a tax on interstate commerce, the Court said (pp. 469, 470):

> "The question is whether the state statute, construed to include the amounts represented as receipts from interstate business, operates directly to regulate or burden interstate commerce.

Admittedly, the exaction is not a tax on property nor in lieu of a property tax. The statute calls it, and in fact it is, a tax for the privilege of carrying on interstate business. Receipts from interstate business are expressly excluded from the calculation. It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. Pullman *v.* Richardson, 261 U. S. 330, 338; New Jersey Telephone Co. *v.* Tax Board, 280 U. S. 338, 346."

In *New Jersey Bell Tel. Co.* v. *Tax Board,* 280 U. S. 338, 74 L. Ed. 463, the Court held that the State Legislature could not impose a franchise tax on a corporation engaged in interstate commerce. At page 346, the Court said:

"Appellant contends that the exaction is a license tax levied directly on gross receipts from interstate as well as intrastate commerce in addition to ad valorem taxes upon its real and personal property and that, therefore, the Act is repugnant to the Commerce Clause.

"Appellee insists that the franchise is intangible property which includes power of eminent domain, right to occupy the streets, good concern value and the benefit of the state policy to have a regulated monopoly. It alludes to Article IV., Sec. VII., Par. 12 of the State Constitution: 'Property shall be assessed according to its true value'; and argues that by using gross receipts as a measure of value of the property like a uniform system of taxation, a true value is attained; that the franchise tax is not upon business commerce or gross receipts as such.

"It is elementary that a state may tax property used to carry on interstate commerce. But, as the constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such commerce or tax as such gross earnings derived therefrom or impose a license fee or other burden upon the occupation or the privilege of carrying on such commerce, whatever may

be the instrumentalities or means employed to that end. Pullman Co. *v.* Richardson, 261 U. S. 330, 338 and cases cited. Sprout *v.* So. Bend, 277 U. S. 163, 171. This tax cannot be sustained if it is not upon the property but is in fact a tax upon appellant's gross receipts from interstate and foreign commerce or a license fee to be computed thereon."

Declaring the Statute to be void, the Court said (p. 349):

> "We think it very plain that the exaction is not a tax on property nor in status for or in lieu of a property tax. Within the rule heretofore applied in this Court, the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and as to that part at least, is void. Phila. Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 336, 345. Galveston H. & S. A. R. Co. *v.* Texas, supra, 227. Meyer *v.* Wells, Fargo & Co., 223 U. S. 298; U. S. Express Co. *v.* Minnesota, 223 U. S. 335; Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, 295, 297. Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450. U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321, 329. Pullman Co. *v.* Richardson, supra.
>
> "Judgment reversed."

In *Wells Fargo & Co.* v. *Nevada,* 248 U. S. 164, 63 L. Ed. 190, at pp. 165, 167, the Court declared that a State could not tax the privilege or act of engaging in interstate commerce but could tax the company's property within the State although chiefly employed in such commerce. Citing *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 220; s. c. 166 U. S. 185, 218; *Galveston, Harris & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, 225, 227; *Cudahy Packing Co.* v. *Minnesota,* 245 U. S. 450, 453.

In *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335, 340, 342, the Court said at pp. 342, 343:

> "It is thoroughly well settled in this Court that state laws may not burden interstate commerce as one form of burden may exist in taxing the conduct of interstate

commerce. Such taxation has been uniformly condemned. Examples of cases of that character may be found in Fargo *v.* Michigan, 121 U. S. 230; Phila. & So. Steamship Co. *v.* Pa., 122 U. S. 326; Rotterman *v.* Western Union Tele. Co., 127 U. S. 411; Leloup *v.* Port of Mobile, 127 U. S. 640; Western Union Tel. Co. *v.* Alabama, 132 U. S. 472; Western Union Tel Co. *v.* Penna., 128 U. S. 39; Galveston, Harris & San Antonio Ry. Co. *v.* Texas, 210 U. S. 217."

To summarize our position, we respectfully contend that the Unemployment Compensation Law taxes an interstate employer as an interstate commerce employer. We contend, under the authorities cited, that the State is without power to levy a tax on interstate commerce as such and by so doing imposes an unlawful burden on interstate commerce which is prohibited by Section 8 of Article I and the Tenth Amendment of the Federal Constitution.

We recognize and concede that in proper cases, the State does have the right to tax property of an interstate commerce employer within the State, but the statute in question makes no pretense of levying a tax on property. On the contrary, the tax is based upon the sole circumstance that the employer engaged in interstate commerce, employs one or more persons.

We therefore contend that Section 307 of the Unemployment Compensation Law directly contravenes the express provisions of the Constitution of the United States.

In overruling this constitutional objection, the court below stated (R. 30a):

> "There is no factual situation in the instant case which justifies the application of any of the principles above referred to."

It is clearly averred in the amended affidavit *of* that appellant was engaged in interstate commerce (Para. 2 of Amended Affidavit of Defense—R. 41a). Inasmuch as judg-

ment was entered for want of a sufficient affidavit of defense, this factual averment as to being engaged in interstate commerce must be accepted as true.

The Opinion of the court below in recognizing the fact that the question which is here presented has not been considered or decided by any Appellate Court of last resort or by this Court cited the decision of *Wisconsin* v. *Cary Mfg. Co.*, decided in the Circuit Court of Wayne County, October 9, 1937, C. C. H. Wis., Par. 8088. Quoting from that case, the court below said:

> "The defense, particularly put forth in the present case as a justification for not making the compensation payments is that the defendant corporation is engaged in interstate commerce and the State of Wisconsin is seeking unconstitutionally to interfere with that commerce. Reliance is had upon the recent decisions of the United States Supreme Court sustaining the National Labor Relations Act as an appropriate exercise of the power by Congress to regulate the commerce between the states * * * Congress has not entered upon the field of unemployment compensation, as it has in labor relations, and the question accordingly of conflict with Federal jurisdiction and clash with the commerce clause of the United States Constitution, is purely academic. The only ground upon which the defendant might predicate his position is that which may be contended to flow from the labor relations cases; namely that Congress has preempted the field; hence the State must keep out. But the simple truth is that Congress has not. The Federal Social Security Act * * * is not an unemployment compensation law."

We most respectfully submit that the determination of this cause is not dependent upon whether Congress has preempted the field of unemployment compensation. The true criterion is whether a State under the provisions of the Federal Constitution may impose a direct tax upon interstate commerce. Under the numerous authorities cited, the

imposition of such a direct tax constitutes a burden on interstate commerce which is prohibited by Section 8 of Article I of the Federal Constitution.

Assuming that Congress has not acted, but under the constitution Congress alone has the power to act, this circumstance, *ipso facto,* does not justify a State to usurp such power. Such action on the part of a State would contravene the provisions of the Tenth Amendment to the Federal Constitution and in the same sense, congress could not, as it has attempted to do by enacting Section 906 of Title 9 of the National Social Security Act, delegate to the states the power to impose a direct tax upon interstate commerce.

We further contend that the Supreme Court of Pennsylvania erred in adopting the reasoning and decision of *Wisconsin* v. *Cary Mfg. Co., supra,* inasmuch as it does not consider or apply the controlling principles of law which were announced by this Court in *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 and *Ozark Pipe Line Corp.* v. *Monier,* 266 U. S. 555 where the Court held that a State can not impose a tax upon the employment of labor exclusively engaged in the furtherance of an interstate business.

It is interesting to note that when the Solicitor General of the United States in arguing in support of the contention of the Government that the Federal Employers' Tax, Title 9 of the Social Security Act was necessary and proper, pointed out that a co-operative plan of legislation between the Federal Government and the States was necessary to accomplish the objective, because a State alone might not be able to protect itself by an embargo or *include within its system employers or employees engaged in interstate commerce.*

In reporting the decision of the *Steward Machine Co.* v. *Davis, supra,* the arguments of counsel are summarized and the contention above alluded to appears in Volume 301 U. S. at page 556.

It is respectfully submitted that this application for appeal is timely in that it is taken within three months after the entry of the final judgment of the Supreme Court of Pennsylvania as provided by Section 8 (a) of the Act of Congress of February 13, 1925 (U. S. Code, Title 28, Section 350, 43 Stat. L. 936), which provides, *inter alia:*

> "That no writ of error, appeal or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefore be duly made within three months after the entry of such judgment or decree."

In this case the final judgment sought to be reviewed was entered on June 30, 1941 and in accordance with the rules of the Supreme Court of Pennsylvania, the application for allowance of appeal to this Court and for a review of the proceedings was filed on July 23, 1941; said application was denied on September 23, 1941 as more fully appears in the Petition for Allowance of Appeal which is presented herewith.

The Supreme Court of Pennsylvania is the highest Appellate Court in the State of Pennsylvania and the decision of the Court is final in all respects.

The jurisdiction of the United States Supreme Court to review this case is expressly conferred by Section 237 (a) of the judicial code hereabove recited.

We most respectfully submit that the questions which are presented for review are of a substantial Federal nature which involves the right of a State to impose an excise tax upon the employment of labor which is exclusively engaged in the furtherance of interstate commerce. The decision of the court below in upholding the right of a State to impose such a tax is in direct conflict with the decisions of this Court, which have held consistently that State stat-

utes levying such taxation are invalid and constitutionally infirm.

We, therefore, most respectfully submit that Section 307 of the "Unemployment Compensation Act" of Pennsylvania is repugnant to the Constitution of the United States, in that:

1. It violates Section 8 of Article I which prohibits States from burdening or interfering with interstate commerce.

2. It violates the Tenth Amendment to the Federal Constitution, in that it unlawfully usurps the power to regulate and burden interstate commerce which power is exclusively reserved to Congress.

Respectfully submitted,

SAMUEL KAGLE,
J. EDGAR SMALL,
Attorneys for Fred C. Perkins,
Individually and trading as
Perkins Battery Company.

EXHIBIT "A".

195.

IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT.

No. 49 May Term, 1941.

COMMONWEALTH OF PENNSYLVANIA

v.

FRED C. PERKINS, Individually and Trading as Perkins Battery Company, *Appellant.*

Appeal from Judgment and Decree of Court of Common Pleas of Dauphin County, No. 1 Commonwealth Docket, 1940.

Memorandum for Reporter.

Filed June 30, 1941.

The court below entered judgment for the Commonwealth in an opinion by Hargest, P. J., which was in part as follows:

"This case involves the constitutionality of the Pennsylvania 'Unemployment Compensation Law' approved December 5, 1936, P. L. (1937) 2897, 43 P. S. (Pocket Sup.) Sec. 751.

"The Commonwealth, in its own name and for the use of the Unemployment Compensation Fund, brought suit against the defendant Fred C. Perkins, individually, and trading as Perkins Battery Company, for the contributions which the Commonwealth claimed were due under the Act. The defendant filed an affidavit of defense raising questions of law and attacking the constitutionality of the Act.

"A number of constitutional attacks have been raised in the pleadings, only five of which are pressed and will be considered.

"1. That the Act violates Article III, Section 18, of the Pennsylvania Constitution which prohibits appropriations for benevolent purposes to any person or community;

"2. That Sections 308 and 309 violate section 7, of Article III, of the Pennsylvania Constitution prohibiting the passage of any local or special law fixing the rate of interest;

"3. That Section 307 taxes employers engaged in interstate commerce, in violation of Section 8, of Article I, of the Pennsylvania Constitution and the Tenth Amendment to the Constitution of the United States;

"4. That the Act violates Article IX, Section 12, of the Pennsylvania Constitution providing that moneys of the State over and above the necessary reserve shall be used in payment of the debt of the State; and

"5. That the statute violates the Tenth Amendment to the Federal Constitution.

"1. Is the statute invalid because it is in violation of Section 18 of Article III of the Pennsylvania Constitution which provides 'no appropriation, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community * * *?'

"The State has no power to take the property of a citizen except by way of taxes or eminent domain. *Beeland Wholesale Co. v. Kaufman,* (Ala.) 174 So. 516. This statute came before the Supreme Court of Pennsylvania on appeal from the decision of this Court. *Fidelity-Philadelphia Trust Co. v. Hines,* 48 Dauph. 59, 337 Pa. 48, 51, 10 A. 2d. 553, 555. No question of constitutionality was therein raised, but it was said:

" 'Although the act provides in form for a payment [of] "contributions", such enforced contributions are in reality [excise] taxes on the right to employ.'

"We must, therefore, treat this statute as a taxing statute.

"Section 1 of Article IX of the Constitution provides that all taxes shall be uniform. There is nowhere in the Pennsylvania Constitution any specific authority given to levy

taxes nor any limitation imposed as to the purposes for which taxes may be levied. The taxing power is vested absolutely in the legislature as an attribute of sovereignty with no other limitation upon its exercise than the Constitutions, State and Federal, and the laws of the United States, and the power to tax, is bounded only by the necessity of the State and the will of the people. *Kirby v. Shaw,* 19 Pa. 258; *Sharpless v. Philadelphia,* 21 Pa. 147; *Clouser v. Reading,* 270 Pa. 92; *Fox's Appeal,* 112 Pa. 337; *Washington Avenue,* 69 Pa. 352.

"It necessarily follows, however, that taxes cannot be laid except for some proper governmental purpose, and it also follows that no appropriations may be made by the State for benevolent purposes. The questions immediately before us are:

"(a) Whether this statute makes an appropriation within the meaning of the Constitution, and

"(b) Whether the tax is laid for a benevolent purpose.

"(a) As we understand the word 'appropriation', when used in the constitutional or legislative sense, it means a designation of money raised by taxation to be withdrawn from the public treasury for a specifically designated purpose. The money in question raised by taxation under this statute never gets into the State Treasury. It is paid into the Unemployment Compensation Fund created under the Act, then paid over to the Unemployment Trust Fund, which is the Federal agency created under the Act of Congress. Then, as often as necessary, it is requisitioned from the Unemployment Trust Fund back to the Unemployment Compensation Fund, into what is known as the Compensation Account, and thence paid to the recipient. The process does not have the earmarks of an appropriation of public moneys as generally understood.

"Whether the moneys are public moneys presents a rather difficult hurdle to clear. On the one hand it might be said with force that a State has no right to raise money by taxation which would not properly be designated public money. It is the sovereign power representing the public which has taxed the money away from the individual. The

government has no power to lay the tax unless it be for a governmental purpose, and it might seem to be juggling with terms to say that when it is the exercise of a governmental purpose, raising money by taxation, that the money so raised, merely because of the method of its treatment when raised, is not public money. Yet that is precisely the trend of the modern decisions.

"In *Gillum v. Johnson* (Calif), 62 P. (2d) 1037, 1043, the Court said: 'It must be conceded that the moneys so contributed under the Act are not public moneys in the sense that they are subject to appropriation other than as provided in the act.'

"To the same effect are the cases of *Howes Bro. v. Unemployment Compensation* (Mass.), 5 N. E. (2d) 720; *Tatum v. Wheeless* (Miss.), 178 So. 95, 102; *Gillum v. Johnson*, 62 P. (2d) 1037, to which fuller reference is made in discussing the fourth question raised by the defendant.

"However, *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 515, seems to treat the fund as a State fund. It is there said: 'We need not labor the point that expenditures for the relief of the unemployed, conditioned on unemployment alone, without proof of indigence of the recipients of the benefits, is a permissible use of State funds.'

"We conclude that the funds are not State funds within the contemplation of Section 18 of Article III of our Constitution.

"(b) The ordinary use of the word 'benevolence' would indicate that a contribution made to one who is unemployed, without the necessity for any proof of indigence, would be a benevolence. This would seem to be so even though the recipient gets it by way of some governmental process, but in the concurring opinion of Mr. Justice Maxey, in *Commonwealth v. Liveright*, 308 Pa. 35, 90, it is said: 'I hold that an appropriation of State money to combat widespread poverty arising from unemployment can no more justly be characterized as "charity" [or] "benevolence" than could an appropriation of State money with which to combat a plague sweeping over Pennsylvania.'

"In the case just cited, Mr. Justice Kephart, in a very extensive opinion reviewing *Busser* v. *Snyder*, 282 Pa. 440, and

Collins v. *Martin*, 290 Pa. 388, held that the care of the poor 'was a fixed governmental duty similar to the enforcement of law and order.'

"We now hold that unemployment is a governmental concern and it is a matter of discretion as to how the legislature shall deal with it. But in *Commonwealth* v. *Liveright*, supra, it was also said, page 76: 'Whether the charitable work is compulsory or discretionary, the performance is controlled by the Constitution.' After discussing the duty of the State towards its poor, the opinion continues, page 79: 'Having twice decided that appropriations to perform obligatory public duties or functions are not charities or benevolences, we again hold that the State, in the performance of its governmental duty to take care of the poor is not forbidden by Article III, Section 18, either directly to assume this obligation or to permit and aid one of its subsidiaries of government to perform it, or to have it performed by an institution not forbidden by the Constitution.'

"As long as these channels are kept clear, constitutional inhibitions will not disturb such acts. If appropriations to perform the obligatory duties are not charities or benevolences, it would seem to be a refinement to hold where there is a governmental concern with which the legislature has discretionary power that it would be a benevolence merely because the one is obligatory and the other discretionary.

"Adopting the language which we have just quoted, we hold that a statute dealing with unemployment, creating an agency for that purpose, is not forbidden by Article II, Section 18, of the Constitution as an appropriation for a charitable or benevolent purpose.

"We might quote at length the extract from *Busser v. Snyder*, 282 Pa. 440, particularly found on page 453, and parts of the opinion in *Commonwealth v. Liveright*, supra, which, if carried to their logical end, might lead to a different conclusion; but we are of opinion that the quotation which we have just made from *Commonwealth v. Liveright* expresses the law as it must be applied to this case in determining its validity under Article III, Section 18, of the Constitution.

"2. It is contended that Sections 308 and 309 of the statute violate Section 7 of Article III of the Pennsylvania Constitution which prohibits the passage of local or special laws fixing the rate of interest.

"These two Sections require that contributions unpaid on the date when they are due shall bear interest at the rate of one per centum per month. It is contended on the authority of the case of *Pennsylvania Co. v. Philadelphia*, 262 Pa. 439, that this is a special act fixing the rate of interest. In that case the Act of 1915, P. L. 685 required that the damages for private property taken 'by municipal corporations' should bear interest at the rate of six per centum per annum 'from the date of such taking.' It was declared unconstitutional because limited to municipal corporations only.

"The statute before us applied to all persons who may be subject to its terms, namely, all employers in the State of Pennsylvania. It could hardly be said that grouping all employers and dealing with them as a class is an unconstitutional classification. No employers are excluded and what applies to one applies to all. We conclude that this is a proper classification. Moreover, twelve per cent interest is not a strange thing in the legislative history of Pennsylvania. It will serve no useful purpose to trace it to its source, but twelve per cent interest has been the penalty for non-payment of taxes for generations.

"It must be assumed that the Legislature of 1874 contained many of those who sat in the Constitutional Convention of 1873 which wrote Article III into the fundamental law, and it may be presumed that those legislators understood what was thereby intended. One of the very first statutes passed by them was the Act of April 24, 1874, P. L. 68, 'for the taxation of corporations,' in which the interest penalty is twelve per centum per annum for non-payment. That penalty has been carried along down through the years by the Acts of 1879, 1887, 1889 and into the Fiscal Code of 1929. The twelve per cent penalty has been before the Court in a multitude of cases, although an investigation has not disclosed that it was ever constitutionally attacked. *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 150; *Commonwealth v. Western Union Telegraph Co.*, 2 Dauph. 30;

Delaware Division Canal Co. v. Commonwealth, 50 Pa. 399; *Commonwealth v. J. B. Lippincott,* 7 Dauph. 193; *Commonwealth v. Provident Life & Trust Co.,* 6 Daugh. 109; *Commonwealth v. Philadelphia,* 157 Pa. 558, 577.

"It would be an unsettling situation to now declare it unconstitutional.

"For these reasons we think there is no merit in this contention.

"3. It is contended that Section 307 of the Act violates the commerce clause of the Federal Constitution.

"Section 8 of Article I of the Constitution of the United States provides, inter alia: 'That Congress shall have power * * * to regulate commerce with foreign nations and among the several states * * *.' The Tenth Amendment provides: 'The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively and to the people.'

"It is settled that the state cannot levy a direct tax on gross receipts derived from interstate commerce. *Meyer v. Wells, Fargo & Co.,* 223 U. S. 298; *Crew Levick Co. v. Pennsylvania,* 245 U. S. 292, 297; *Cudahy Packing Co. v. Minnesota,* 246 U. S. 450. Neither can the State tax the privilege of engaging in interstate commerce although it may tax the property within a State so employed. *Wells, Fargo & Co. v. Nevada,* 248 U. S. 165, 167; *East Ohio Gas Co. v. Tax Commission,* 283 U. S. 465, 469; *Adams Mfg. Co. v. Storen,* 304 U. S. 307, 311.

"The contention of the defendant is that this tax is invalid because the employer is engaged in interstate commerce and it amounts to a tax on the privilege to so engage within the State. There is no factual situation to show that the defendant is within that class, but we prefer to put our decision on the broader ground assuming that he is.

"The defendant largely relies on *Southern Pacific Co. v. Gallagher,* 306 U. S. 167, 180. In that case, the Court, referring to the case of *Ozark Pipe Line Corp. v. Monier,* 266 U. S. 555, said: 'This Court pointed out that the corporation had a license to engage exclusively in interstate business. The language just quoted shows that this Court interpreted the transactions in Missouri as merely a part of the interstate commerce and the tax on the franchise an

interference therewith because a tax directly upon it. "* * * nothing was done in Missouri except in furtherance of transportation." It was this conclusion of the court on the factual situation which brought about the Ozark decision. Where there is also intrastate activity, an apportioned state franchise tax on foreign corporations doing an interstate business is upheld. A franchise tax on an exclusively interstate business is a direct burden; proportioned to an intermingled business, it is valid. Since the incidence of the California tax as here interpreted is upon events outside of interstate commerce, the Ozark opinion is not applicable. There the Missouri tax was upon activities found wholly interstate.'

"There is no factual situation in the instant case which justifies the application of any of the principles above referred to.

"There is, however, another situation which requires serious consideration. Section 307 of the statute provides: 'No employer required by this act to pay contributions shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that this Act does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.'

"In Section 906 of the Social Security Act, Congress seems to have made plain that it did not intend to cover the field of interstate commerce which the State statute attempts to do. That section provides: 'No person required under a state law to make payments to an Unemployment Fund, shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce or that the state law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce.'

"The plain purport of that Section seems to be that Congress has intended to meet the specific language quoted from *Southern Pacific Co. v. Gallagher*, supra, and has indicated that it has not intended to cover the field of Unemployment Compensation as related to interstate commerce, even though there is no apportionment of the tax as to interstate and intrastate business.

"It may be argued that Congress cannot, by the ipsi dixit contained in Section 906, as above quoted, determine that the law, as declared in the case of *Sligh v. Kirkwood*, 237 U. S. 52, shall not apply. However, that may be, it is well settled that even in commerce among the states the police power of the State to prescribe regulations within its borders is not taken away until Congress enters and covers the field.

"In *Sligh v. Kirkwood*, 237 U. S. 52, 58, it is said: 'That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the State, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities is unnecessary. See the *Minnesota Rate Cases*, 230 U. S. 352.'

"By the enactment of the Social Security Act, Congress has not been silent but has affirmatively declared that it does not intend to cover this field, and by the enactment of the Pennsylvania statute the Legislature of Pennsylvania has asserted that it intends to exercise its power until Congress does cover the field. In the case of *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, the power of the State of Alabama to enact an unemployment compensation act, almost identical with the statute of Pennsylvania, has been sustained. The question of the illegality of the Alabama statute under the commerce clause of the Federal Constitution does not seem to be directly passed upon either in the Supreme Court of the United States or in the Alabama Court. *Beeland Wholesale Company v. Kaufman*, (Ala.), 174 So. 516.

"In the case of *Steward Machine Co. v. Davis*, 301 U. S. 548, the Supreme Court of the United States distinctly sustained the power of Congress to enact Titles 3 and 9 of the Social Security Act. It was there held, with reference to the Alabama statute, page 597: 'Even sovereigns may

contract without derogating from their sovereignty. * * * The states are at liberty, upon obtaining the consent of Congress, to make agreements with one another. * * * We find no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. Alabama is seeking and obtaining a credit of many millions in favor of her citizens out of the treasury of the nation. Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she is prohibited from assenting to conditions that will assure a fair and just requital for benefits received. But we will not labor the point further. An unreal prohibition directed to an unreal agreement will not vitiate an act of Congress, and cause it to collapse in ruin.'

"It is true also that the commerce clause of the Constitution is not directly involved in this decision, but in the case of *Wisconsin v. Cary Mfg. Co.*, decided in the Circuit Court of Wayne County, October 9, 1937, C. C. H. Wisc., Par. 8088, the Court had before it the Unemployment Compensation Act of Wisconsin in which the question was directly raised, and there the Court said: 'The defense particularly put forth in the present case as a justification for not making the compensation payments is that the defendant corporation is engaged in interstate commerce, and the state of Wisconsin is seeking unconstitutionally to interfere with that commerce. Reliance is had upon the recent decisions of the United States Supreme Court sustaining the National Labor Relations Act as an appropriate exercise of the power by Congress to regulate commerce between the states. * * * Congress has not entered upon the field of unemployment compensation, as it has in labor relations, and the question accordingly of conflict with Federal jurisdiction and clash with the commerce clause of the United States Constitution, is purely academic. The only ground upon which the defendant might predicate his position is that which may be contended to flow from the labor relations cases; namely that Congress has pre-empted the field; hence the State must keep out. But the simple truth is that Congress has not. The Federal Social Security Act * * * is not an unemployment compensation law.'

"We are therefore of opinion that the Pennsylvania statute does not violate the commerce clause of the Federal Constitution.

"4. The defendant contends that Section 6 of the Compensation Law, which provides for the retention of surplus funds in the custody of the State Treasurer, to be invested as provided under the Act of 1929, and the retention of surplus funds in the Unemployment Trust Fund by the United States Treasurer violates Section 12 of Article IX of the Pennsylvania Constitution. This Section provides: 'The moneys of the State over and above the necessary reserve shall be used in the payment of the debt of the state, either directly or through the sinking fund, and the moneys of the sinking fund shall never be invested in or loaned upon the security of anything; except the bonds of the United States or of this State.'

"The scheme set up by the statute is as follows: Contributions are collected by the State Department of Labor and Industry, through the machinery provided by the Act, and deposited in an Unemployment Compensation Fund. From time to time moneys in this Fund are paid over to the Treasurer of the United States and deposited by him in an Unemployment Trust Fund created by the Social Security Act of Congress. These sums are credited to the State of Pennsylvania. As often as may be necessary, the Department of Labor and Industry may requisition from the Unemployment Trust Fund such amounts necessary to pay compensation under the Act. Upon receipt of such requisitioned funds, the Department deposits them in the Unemployment Compensation Fund in a ledger account to be known as the Compensation Account, and expends such moneys for the payment of compensation. All moneys to the credit of the Compensation Account are required to be mingled and undivided. The Department pays compensation authorized by this Act out of the Compensation Account. There is also created a special fund known as the Administration Fund, which consists of moneys paid to the Department by the United States. The State Treasurer is the custodian of the Unemployment Compensation Fund and the Administration Fund. The moneys belonging to

such funds are deposited by the State Treasurer as the general funds of the Commonwealth are deposited, but no deposit insurance charge is paid out of the Compensation Fund. The budgetary provisions required by the Administrative Code shall not apply to these funds. If Title IX of the Social Security Act is repealed or held unconstitutional, the Department then requisitions all moneys from the Unemployment Trust Fund. And the Act of Congress provides, Section 903, that if the state laws are repealed or invalidated, the funds shall be paid over to the respective state.

"If these funds are State funds there is some basis for the contention that under the cases of *Schnader v. Liveright*, 308 Pa. 35, 67, 68, and *Montgomery v. Martin*, 294 Pa. 25, 43, this statute would violate the constitutional provision above quoted in that the moneys are being applied and kept otherwise than as directed therein.

"Unemployment statutes have been enacted in a number of states and have been the subject of judicial review. It seems to be invariably held that the revenue so raised is not money of the State. In *Beeland Wholesale Co. v. Kaufman*, 174 So. 516, 525, where the attack was made that the act violated the Constitution in that it was an act to raise revenue and had not originated in the House as the Constitution required, the Court said: 'But when an Act has for its main purpose provision for the general welware by enacting a scheme within the state's police power, it is not one to raise revenue, though it does so as an incident to such scheme.'

"In *Gillum v. Johnson*, (Calif.), 62 P. (2d.) 1037, 1043, the Court said: 'It must be conceded that the moneys so contributed under the act are not public moneys in the sense that they are subject to appropriation other than as provided in the act. * * * The balances (in the funds) do not revert to the general fund at the end of the fiscal year and under both the state and federal acts constitute trust funds to be administered by the state commission and subject to its call at all times.'

"In *Howes Bros. Co. v. Unemployment Compensation Commission*, (Mass.), 5 N. E. (2d.) 720, 728, the Court said: 'The contributions under the unemployment compensation

law are not a part of the general revenue of the Commonwealth, although paid into the State Treasury. They are raised by the Commonwealth for a particular purpose through the exercise of the police power.'

"In *Tatum v. Wheeless* (Miss.), 178 So. 95, the Court said, page 102: 'A sufficient answer to this contention is that the fund here provided for and collected is not a fund for the general purposes of running the state government, or providing for the expense of operating the state government. The fund here created is not to be placed in the state treasury—it is a trust fund to be held and applied for the benefit of a class of employees, in the nature of unemployment insurance, and is authorized by law. In other words, the funds here provided are trust funds, and do not belong to the state in its sovereign capacity.'

"We adopt the reasoning of these cases and hold that the funds are not State funds, and it therefore follows that the constitutional provision applicable to the investment of State funds does not control.

"The defendant has attacked the statute both as to the manner of its operation and the size of the revenue provided under it, but these are legislative questions which, at least under the present state of the record, the Court has no power to consider.

"5. The defendant finally contends that Article VI of the Act violates the Tenth Amendment to the Federal Constitution in that it deprives the State from functioning as a sovereign state and that the surrender of the surplus moneys to the Treasury of the United States is, pro tanto, an unconstitutional surrender of sovereignty.

"This question is considered at length in the case of *Steward Machine Co. v. Davis*, 301 U. S. 548, 593, et seq. and decided against the contentions of the defendant.

"The question of coercion of States by the passage of the Federal statute has been considered in the cases of *Tatum v. Wheeless*, (Miss.), 178 So. 95; *Gillum v. Johnson*, (Calif.) 62 P. (2d.) 1037; *Howes Bros. Co. v. Unemployment Compensation Commission*, (Mass.), 5 N. E. (2d.) 720; *Beeland Wholesale Co. v. Kaufman* (Ala.), 174 So. 516. It is held in each case that there is no unconstitutional coercion.

"For the reasons herein expressed, we conclude that this statute does not violate the Tenth Amendment to the Federal Constitution."

PER CURIAM:

The judgment is affirmed on the foregoing portions of the opinion of President Judge Hargest.

(7798)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941

No. 794

FRED C. PERKINS, INDIVIDUALLY AND TRADING AS PERKINS BATTERY COMPANY,

Appellant,

vs.

COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 794

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

vs.

FRED C. PERKINS, INDIVIDUALLY AND T/A PERKINS BATTERY CO.,
Appellant.

MAY TERM, 1941. No. 49.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

To the Honorable Harlan Fiske Stone, Chief Justice, and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Pennsylvania, Appellee herein, by its Attorneys, Claude T. Reno, Attorney General, and David R. Perry, Special Deputy Attorney General, respectfully submit herewith their statement showing the Matters or

Grounds Making Against the Jurisdiction of the Supreme Court as asserted by appellant in that cause:

The present proceeding grows out of a suit in assumpsit filed by the Commonwealth of Pennsylvania, Appellee, against Fred C. Perkins, individually and trading as the Perkins Battery Co., Appellant, to collect from him contributions due and owing by him as an employer under and subject to the provisions of the Pennsylvania Unemployment Compensation Law, P. L. 1937, 2897, etc., 43 P. S. (Pocket Sup.) Sec. 751. The appellant denied liability on alleged grounds of unconstitutionality of the Pennsylvania Statute.

To sustain the jurisdiction of the Supreme Court of the United States in this cause the appellant alleges:

That Section 307 of the Unemployment Compensation Law of Pennsylvania is repugnant to the Constitution of the United States, in that:

1. It violates Section 8 of Article I of the Constitution of the United States, which prohibits states from burdening or interfering with interstate commerce.

2. It violates the Tenth Amendment to the Federal Constitution, in that it unlawfully usurps the power to regulate and burden interstate commerce which power is exclusively reserved to Congress.

A.

Appellant's first statement in support of the Honorable Court's jurisdiction is:

That Section 307 of the Unemployment Compensation Law of Pennsylvania is repugnant to the Constitution of the United States, in that:

> "It violates Section 8 of Article I which prohibits states from burdening or interfering with interstate commerce."

The Section of the Pennsylvania Law thus attacked, reads:

> "Section 307. Interstate Commerce.—No employer required by this act to pay contributions shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that this act does not distinguish between employes engaged in interstate commerce and those engaged in intrastate commerce."

Even a most casual examination of the Pennsylvania Unemployment Compensation Law, makes self evident that the law,

1. in practical effect, makes no attempt to regulate interstate commerce; nor

2. does it impose a burden sufficient to impede the free flow of such commerce; nor

3. does it discriminate against such interstate commerce in favor of intrastate commerce; nor

4. does it conflict with any regulation made by Congress in the exercise of its supreme right.

Nothing in the record before your Honorable Court, other than appellant's *ipse dixit* assertion in his affidavit of defense, discloses that he is an employer engaged in interstate commerce or materially affected in relation thereto. Under such circumstances, so far as relates to appellant, any discussion of constitutionality under the "Interstate Commerce Clause" would of necessity be largely abstract and academic.

Mr. Justice Douglas in the recent case of *Nelson* v. *Sears Roebuck Co.*, 61 S. Ct. 586 (1941) said, at page 589,

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determined whether a given tax prohibitively discriminates against interstate commerce." • • •

"A tax or other burden obviously does not discriminate against interstate commerce where 'equality is the theme'."

B.

Appellant's next statement in support of the Honorable Court's jurisdiction is:

That Section 307 of the Unemployment Compensation Law of Pennsylvania is repugnant to the Constitution of the United States, in that:

"It violates the Tenth Amendment to the Federal Constitution in that it unlawfully usurps the power to regulate and burden interstate commerce, which power is exclusively reserved to Congress."

The plain purpose of the Federal act was not to enact a Federal unemployment compensation law, but rather to encourage the passage of unemployment compensation laws by the several States. In this connection the Federal tax (Title IX) allows credits and offsets as specified in Section 902 of that act, based on contributions paid under State unemployment compensation laws duly approved by the Federal Social Security Act (26 U. S. C. A. 1600 &c). The Social Security Act, moreover, makes plain beyond peradventure that Congress was not (and did not intend) enacting a Federal unemployment compensation law applicable to interstate commerce employments. On the contrary, Congress expressly indicated its intent that State laws should cover employment and unemployment in such commerce by stating:

"No person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce, or that the state law does not distinguish between employees engaged in interstate commerce and those engaged in intrastate commerce." (26 U. S. C. A. 1606 a)

By such an enactment, Congress itself most affirmatively announces and declares that it has not, nor does it intend to enter or cover this field. It relinquishes, as it were, exclusive jurisdiction therein to the Commonwealth of Pennsylvania and the Pennsylvania Unemployment Compensation Law. It follows, therefore, that no question of conflict could possibly arise as relates to the Pennsylvania Unemployment Compensation Law being a prohibited "regulation" of interstate commerce.

It is therefore submitted that Congress has in no sense entered, and that certainly it has not preempted, the field of unemployment compensation as applied to interstate commerce employments other than as to certain classes, i. e., railroads not herein involved.

C.

The general power of the States to enact unemployment compensation laws has already been determined by your Honorable Court in its decision in *Carmichael* v. *Southern Coal and Coke Company*, 57 Supreme Court, 868.

The constitutionality of the Federal Social Security Act was also upheld by your Honorable Court in *Steward Machine Company* v. *Davis*, 301 U. S. 548. The appellant makes mention of the fact that in argument of the latter case before your Honorable Court, the Solicitor General pointed out that a sustaining of the Federal Act was necessary because the States alone might not be able to protect themselves by an embargo or include within their own systems employers or employees engaged in interstate commerce. It is noteworthy, however, that in spite of the numerous constitutional questions raised before your Honorable Court on these two cases, your Honorable Court in its decisions thereon made no reference whatsoever to the validity or invalidity of either the Federal or State Acts, insofar as the interstate commerce question was concerned.

The right of the State to enact laws to protect the public health, the public morals, and the public safety, or to regulate in the interest of any of these objectives has never been deemed as violating the commerce laws of the Federal Constitution, where the States' enactment in their general and universal operations, only incidentally effect interstate commerce. State legislation is repugnant to the commerce laws only in those instances where it is shown that the challenged legislation imposes real obstacles and burdens upon interstate commerce through working a control or regulation over it.

MOTION TO DISMISS.

The Appellee moves the Court to dismiss the appeal filed herein on the ground that the question raised by the appeal is more fanciful than real and the case presents no substantial Federal question.

MOTION TO AFFIRM.

In the event that the aforesaid Motion to Dismiss is not granted, the Appellee moves the Court to affirm the decision of the Pennsylvania Supreme Court affirming judgment of lower court in sustaining Rule for Judgment for Want of a Sufficient Affidavit of Defense for the following reasons:

1. The questions raised by the appellant herein, involve no substantial federal question.

2. The questions raised by the appellant have, in substance, been determined by the Supreme Court of the United States, in its decision entered in *Carmichael* v. *Southern Coal and Coke Co.*, 57 S. Ct. 868; 301 U. S. 495.

3. The construction by the Supreme Court of Pennsylvania of the "Interstate Commerce Clause" upon which

the appeal is founded is in accord with the construction given by the Supreme Court in:

Carmichael v. *Southern Coal & Coke Co.*, 57 S. Ct. 868; 301 U. S. 495;
Steward Machine Co. v. *Davis*, 301 U. S. 548.

Respectfully submitted,

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DAVID R. PERRY,
Special Deputy Attorney General,
Counsel for Appellee.

(7799)

No. 794. PERKINS, TRADING AS PERKINS BATTERY CO., *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. January 5, 1942. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. § 1606 (a) of the Internal Revenue Code as amended, 53 Stat. 1391; *Kentucky Whip & Collar Co.* v. *Illinois Central Railroad Co.*, 299 U. S. 334. *Mr. Samuel Kagle* for

appellant. *Mr. Claude T. Reno*, Attorney General of Pennsylvania, for appellee. Reported below: 342 Pa. 529, 21 A. 2d 45.